3.4 Tribal Treaty Rights and Trust Responsibilities

3.4.1 Introduction

There are 17 Indian tribes located in Washington State with adjudicated fishing rights in Puget Sound. The Proposed Action or alternatives to the Puget Sound Chinook Harvest Resource Management Plan could potentially affect fishing rights guaranteed by treaty and recognized in U.S. v. Washington (commonly known as the Boldt decision). This section contains a brief history of federal-tribal relations, and a general legal description of the treaty rights of Northwest tribes. It concludes with a discussion of the trust obligation of the federal government to protect those rights.

3.4.2 Federal–Tribal Relations

From the formation of the United States to the present, federal law has recognized Indian tribes as independent political entities with powers over their members and territory (Worcester v. Georgia 1832). The Constitution provides Congress with the authority to regulate commerce "among the several states, and with the Indian tribes" (United States Constitution, Article I, Section 8, clause 3). This power to regulate commerce with Indian tribes includes the exclusive authority to deal with Indian tribes respecting their rights to aboriginal lands, which have always been protected from trespass or other interference by states or private parties. Central to the protection of lands has always been, and continues to be, the need to provide for Indian hunting, gathering and fishing rights. In addition, the federal government has a legal obligation to act in the best interest of Indian tribes.

Prior to 1871, most dealings pertaining to tribal lands were accomplished pursuant to treaties entered into between the United States government and Indian tribes. The treaties typically provided for the surrender of large areas of land owned and occupied by the Indians to allow the westward expansion of non-Indians. In exchange, the United States recognized permanent homelands (reservations), and sometimes explicitly provided for off-reservation hunting and fishing rights. Treaties with Indian tribes are recognized as the supreme law of the land and trump any conflicting state law. Treaty language securing fishing rights is not "a grant of rights [from the federal government] to the Indians, but a grant of rights from them – a reservation of those not granted" (U.S. v. Winans 1905). In other words, the tribes retain rights not surrendered. Courts "interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them" (Minnesota v. Mille Lacs Band of Chippewa 1999). In addition, the Supreme Court has established "that Indian treaties are to be interpreted liberally in favor of the Indians, and that any ambiguities are to be resolved in their favor" (Minnesota v. Mille Lacs Band of Chippewa 1999).

3.4.3 The Trust Responsibility

The United States government has assumed the duty of protecting Indian land and ensuring the exercise of hunting and fishing rights. This duty is generally known as the federal trust responsibility. As described by the Supreme Court, "under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust" (Seminole Nation v. U.S. 1942). Most recently, in Department of the Interior v. Klamath Water Users Protective Association (2001), the Supreme Court noted that:

> The fiduciary relationship has been described as "one of the primary cornerstones of Indian law," F. Cohen, Handbook of Federal Indian Law 221 (1982), and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.

This trust responsibility has been interpreted to require that federal agencies carry out their activities in a manner that is protective of Indian treaty rights. For example, in cases involving the management of Bureau of Reclamation water projects, the United States must exercise any discretion for the benefit of Indian tribes (see Pyramid Lake Paiute Tribe of Indians v. Morton 1973); Klamath Water Users Protective Association v. Patterson 2000; and Klamath Drainage District v. Patterson 2000). Courts have also ruled that the United States has an obligation to ensure that tribal oil and gas lessees obtain the best possible return on their leases, (Cheyenne Arapaho Tribes of Oklahoma v. U.S. 1992); and Woods Petroleum v. U.S. 1993), and to consult with the tribes before taking administrative action that may affect tribal services (see Winnebago Tribe of Nebraska v. Babbitt 1996). In Executive Order No. 13175, the President affirmed the trust responsibility of the United States, and directed all federal agencies to consult with Indian tribes when taking action affecting such rights (Executive Order No. 13175, November 6, 2000). These substantive and procedural rules, discussed below, must be considered in evaluating the Puget Sound Chinook Harvest Resource Management Plan and alternatives (Secretarial Order No. 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act*, June 5, 1997).

3.4.4 Indian Treaty Rights in Puget Sound

In 1854 and 1855, many Indian tribes in the Pacific Northwest signed treaties with the United States that ceded much of the tribes' aboriginal territory and established several reservations for tribal occupancy. Essential for securing Indian consent to the treaties was the promise that continued access

to fisheries would be guaranteed for future generations. This guarantee was included in the Treaty of Medicine Creek, in a provision typical of that found in Treaties with other Northwest tribes:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens.
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> Treaty of Medicine Creek , Article III, 10 Statute 1132. *See also*, Treaty of Point Elliott, 12 Statute 927; Treaty of Point-No-Point, 12 Statute 933; Treaty of Neah Bay, 12 Statute 939; and Treaty of Olympia, 12 Statute 971, hereinafter referred to as the "Stevens Treaties".

These fishing clauses of the Stevens Treaties have been at the center of litigation for more than 100 years. In U.S. v. Winans, the Supreme Court construed the fishing rights provisions of these treaties as securing the right to cross privately-owned lands to reach usual and accustomed fishing stations within a tribe's ceded territory (U.S. v. Winans 1905). Private landowners had blocked tribal members from access that was necessary to reach a usual and accustomed fishing site. The Supreme Court rejected the argument that the Indians lost the access since no easement across the private land appeared on the face of the treaty, or on the patent issued to the private landowners territory (U.S. v. Winans 1905). The treaty was said to "impose a servitude upon every piece of land [adjacent to a usual and accustomed fishing place] as though described therein." The Supreme Court applied the same rule to guarantee access to usual and accustomed stations outside the ceded area involved in Winans (Seufert Brothers Company v. U.S. 1919). State attempts to limit the exercise of treaty fishing rights by a licensing scheme were also rejected (Tulee v. Washington 1942). Despite these favorable rulings, Indian treaty rights were ignored by the State of Washington at the time, and State officials frequently subjected tribal members to harassment and prosecution. This led to intense litigation.

In 1974, Judge Boldt ruled that the Stevens Treaties reserved to the Tribes the right to take up to 50 percent of the harvestable surplus of fish passing their "usual and accustomed grounds and stations" (U.S. v. Washington 1974). The Supreme Court affirmed the substance of the Boldt decision following several years of resistance on the part of Washington State (Washington v. Washington State Commercial Passenger Fishing Vessel Association 1979).

Subsequent proceedings determined that the treaty rights pertain to hatchery fish, shellfish and all other species found at the usual and accustomed grounds and stations of a given tribe (U.S. v. Washington, reporter volume 759, 1985; and (U.S. v. Washington 1998 and 1999). There are no restrictions on the methods that tribes may use to take fish, and the fish may be taken for any purpose (U.S. v. Washington 1974).

Private parties, the state, or the federal government may not limit access to tribal usual and accustomed grounds and stations without congressional approval (Muckleshoot v. Hall 1988; and Northwest Sea Farms v. Army Corps of Engineers 1996). The State may regulate the exercise of treaty fishing rights when necessary for conservation purposes, provided that the state regulations do not discriminate against Indian treaty fisheries (Puyallup Tribe v. Washington Department of Fish and Game 1968; Washington Game Department v. Puyallup Tribe 1973; Puyallup Tribe v. Washington Game Department 1977; and U.S. v. Washington 1975 and 1976). In other words, the State may not directly regulate Indian fisheries until after it has established the absolute conservation necessity for its action (U.S. v. Washington 1985). This authority has rarely been exercised, in part, because the Tribes and State manage fisheries cooperatively through agreements such as the one that is the subject of this Environmental Impact Statement (Secretarial Order No. 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act*, June 5, 1997). The same principles apply when the United States regulates treaty fisheries, since the federal trust responsibility requires that the actions of the government support the exercise of treaty fishing rights.

3.4.5 Tribal Regulation and Usual and Accustomed Grounds and Stations

The tribes of Washington State, prior to western contact (Secretarial Order No. 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act*, June 5, 1997), governed the fisheries of Puget Sound with a set of rules that were dependent upon inter-tribal relations and kinship ties between tribal groups (U.S. v. Washington 1974). Tribal authority to regulate member fishing on and off the reservation has been recognized in the modern era as well (U.S. v. Washington, 1975 and 1976; and Settler v. Lameer 1974). In recent years, tribal regulators have worked in conjunction with state and federal managers on a variety of matters that address conservation and habitat protection.

There has been a significant amount of litigation over what constitutes a particular tribe's usual and accustomed grounds and stations. Judge Boldt originally ruled that:

> . . . every fishing location where members of a tribe customarily fished from time to time at and before treaty times . . . is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish stations.
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> U.S. v. Washington 1974.

This interpretation was applied to determine the usual and accustomed grounds and stations of a number of intervening tribes (U.S. v. Washington 1975), which continue to be refined through additional litigation (Muckleshoot Indian Tribe v. Lummi Indian Nation 1998; and Muckleshoot Indian Tribe v. Lummi Indian Nation 2000). Tribal fishermen can exercise treaty fishing rights only at the

usual and accustomed fishing grounds and stations of their respective tribe. Determining tribal usual and accustomed areas can sometimes be complex due to the fact that many of the modern tribes are federally-imposed confederations of differing bands and tribes of various treaty signatories. For purposes of this Environmental Impact Statement, however, it is not critical to determine with precision which tribe may fish at a particular site. Instead, the task is to ensure that the Puget Sound Chinook Harvest Resource Management Plan and alternatives are evaluated for consistency with treaty rights and the federal trust responsibility to recognize that all locations within the action area comprise the usual and accustomed grounds and stations of one or another of the Puget Sound tribes.

3.4.6 Limitations on the Exercise of Indian Treaty Rights

Congress has the authority to abrogate or limit the exercise of Indian treaty rights, but such abrogation will be found only if there "is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" (U.S. v. Dion 1986). The Supreme Court has ruled that Indian treaty rights are property rights (Menominee Indian Tribe v. United States 1968; and Hynes v. Grimes Packing Company 1949). Thus, the Fifth Amendment to the Constitution requires that the United States pay "just compensation" for the taking of Indian treaty rights (U.S. v. Shoshone Tribe of Indians 1938). Accordingly, courts will not lightly imply a finding that treaty rights have been abrogated (Menominee Indian Tribe v. U.S. 1968).

Whether the Endangered Species Act applies directly to limit the exercise of Indian treaty rights has not been resolved, and the two courts that have directly addressed the issue reached conflicting results (compare U.S. v. Dion 1985 and 1986, with U.S. v. Billie 1987; also see *Application of the Endangered Species Act to Native Americans With Treaty Hunting and Fishing Rights* 1980).

Because tribes and the federal government have vital interests in salmon recovery, the tribes and the federal government jointly developed a way to harmonize treaty rights and recovery efforts under the Endangered Species Act. The Secretaries of the Interior and Commerce signed an Order in 1997, directing both the National Marine Fisheries Service and the U.S. Fish and Wildlife Service to engage in government-to-government negotiations with affected Indian tribes when exercising their authorities under the Endangered Species Act (Secretarial Order No. 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act,* June 5, 1997). The purpose of the Secretarial Order is to ensure that the agencies that administer the Endangered Species Act "carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that

Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation" (Secretarial Order No. 3206, Section 1). In addition, an appendix to that Secretarial Order spells out federal obligations to consult with tribes in evaluating candidate species, the listing process, section 7 consultations, habitat conservation planning, recovery planning and in carrying out law enforcement functions that follow (see Wilkinson 1997).

The National Marine Fisheries Service acknowledges that it has a "trust obligation to minimize impacts on tribes as much as possible while still meeting agency responsibilities under the Endangered Species Act. As provided in the Secretarial Order (Wilkinson 1997):

> In cases involving an activity that could raise the potential issue of an incidental take under the Act, such notice shall include an analysis and determination that all of the following conservation standards have been met:
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> (i) the restriction is reasonable and necessary for conservation of the species at issue
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> (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities
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> (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose
>
> (iv) the restriction does not discriminate against Indian activities, either as stated or applied
>
> (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.
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> Secretarial Order No. 3206, Principle 3.

Salmon recovery efforts must strive to achieve two goals: 1) the conservation and delisting of endangered and threatened species under the Endangered Species Act; and 2) the restoration of salmon populations to a level sufficient to allow for the full exercise of treaty fishing rights (letter from Assistant Secretary for Oceans and Atmosphere to Ted Strong, Chairman of the Columbia River Inter-Tribal Fish Commission, July 21, 1998). However, any conservation burden required under the Endangered Species Act must be allocated in a manner that ensures, among other things, that it does not discriminate against Indian treaty fishing, and is implemented in the least restrictive manner necessary to provide self-sustaining natural- and hatchery-produced salmon (U.S. v. Washington 1985).

The Endangered Species Act provides a basic level of protection for conservation and survival of listed species with the goal of bringing them to the point at which the measures provided by the Act are no longer necessary. The trust obligation of the federal government to the Tribes to restore salmon stocks to commercially-harvestable levels is an additive trust and treaty-based obligation above that prescribed by the Endangered Species Act (letter from Assistant Secretary for Oceans and Atmosphere to Ted Strong, Chairman of the Columbia River Inter-Tribal Fish Commission (July 21, 1998).